IN THE

Supreme Court of the United States

October Term, 1980

No. 80-348

H.A. ARTISTS & ASSOCIATES, INC.; S.T.E. REPRESENTATION LTD.; J. MICHAEL BLOOM, LTD.; DON BUCHWALD & ASSOCIATES, INC.; MARJE FIELDS, INC.; HENDERSON/HOGAN AGENCY INC.; OPPENHEIM-CHRISTIE ASSOCIATES LTD.; JOEL PITT LTD.; TALENT REPRESENTATIVES INC.; D.M.I. TALENT ASSOCIATES, LTD.; JEAN THOMAS AGENCY, INC.; BOB WATERS AGENCY, INC.; JACOBSON-WILDER INC.; WILLIAM D. CUNNINGHAM & ASSOCIATES, INC.; TRANUM ROBERTSON & HUGHES, INC.; MONTY SILVER AGENCY LTD.; BRET ADAMS, LIMITED; MICHAEL THOMAS AGENCY, INC.; LESTER LEWIS ASSOCIATES, INC.; LEAVERTON ASSOCIATES LTD.; JOE JORDAN TALENT AGENCY INC.; RAGLYN-SHAMSKY, LTD.; ANN WRIGHT REPRESENTATIVES INC.,

Petitioners,

against

ACTORS' EQUITY ASSOCIATION, an unincorporated association, and DONALD GRODY,

Respondents.

ON WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SECOND CIRCUIT

REPLY BRIEF FOR THE PETITIONERS

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REPLY BRIEF FOR THE PETITIONERS

Introduction

Petitioners ("Agents") submit this brief in reply to various legal issues raised and incorrect or misleading statements made in the opposing briefs of respondents and their *amici curiae*[1] ("unions").

For the first time since the inception of this action in May, 1978, the unions in their briefs to this Court argue that: (1) respondents' conduct does not restrain trade or commerce under the Sherman Act because of the first sentence of section 6 of the Clayton Act which states that ,"The labor of a human being is not a commodity or article of commerce"; (2) even if the Agents are not part of a union labor group, they are nevertheless a party to a labor dispute. Petitioners contend that these new arguments are untimely and devoid of merit (Points I and II). In Point III, petitioners respond to the argument that the conduct of respondent Actors' Equity Association ("Equity") is protected by the nonstatutory exemption from the antitrust laws. In Point IV, petitioners demonstrate that the unions' rationales for the regulation of agents do not justify Equity's severe and pervasive restrictions of agents.

Before discussing the foregoing issues a few minor observations are in order. The unions continue to rely on *Edelstein* v. *Gillmore*, 35 F.2d 723 (2d Cir. 1929), *cert. denied*, 280 U.S. 607 (1930) (although the courts below did

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[1] The three opposing briefs will be referred to hereinafter as:

"Resp. Br." —Brief of respondents;

"AFL-CIO Br."—Brief of the American Federation of Labor and Congress of Industrial Organizations;

"Joint Br." —Brief of American Federation of Television and Radio Artists ("AFTRA"), Screen Actors Guild, Inc. ("SAG"), Writers Guild of America, West, Inc., and Writers Guild of America, East, Inc.

Petitioners' initial brief will be referred to hereinafter as "Pet. Br.".

not refer to this decision) as "upholding" the franchising regulations,[2] without advising the Court that plaintiff in *Edelstein* v. *Gillmore* challenged Equity's regulations on common law grounds of tortious interference rather than as violations of antitrust laws.

The unions' reliance on *Local 24, International Brotherhood of Teamsters* v. *Oliver,* 358 U.S. 283 (1959), and *Local 24, International Brotherhood of Teamsters* v. *Oliver,* 362 U.S. 605 (1960), is misplaced. These cases involve labor disputes between unions and groups of individuals who perform the same functions as union members and compete with them for jobs.[3]

In its brief (Resp. Br. 6 n. 5a), Equity refers to alleged "abuses" by agents without advising this Court that:

1. Initially Equity asserted that its franchising regulations were necessary to protect actors from "exploitation and overreaching" by agents (June 14, 1978, affidavit of respondent Donald Grody, para. 7). At trial Equity totally reversed its position, asserted that the conduct of the Agents is "not an issue in this case" (R. 45 (pp. 655-56)) and invited the allegedly unscrupulous and incompetent agents to become refranchised and continue representing Equity's members (R. 44 (p. 532)).

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[2] Resp. Br. 2 n.3, 30 n.28. See also Joint Br. 4 ("Equity's regulations . . . received authoritative judicial approval"), 12-13, 23.

[3] *Oliver I* and *II* are further distinguishable on the ground that they did not involve the labor exemption to the federal antitrust laws. *Oliver I* and *II* precluded the applicability of Ohio's state antitrust laws to a collective bargaining agreement under the doctrine of federal preemption. Thus, the Supreme Court in *Connell Construction Co.* v. *Plumbers & Steamfitters Local 100,* 421 U.S. 616, 635 (1975), noted:

> "The [Supreme] Court has held repeatedly that federal law pre-empts state remedies that interfere with federal labor policy or with specific provisions of the NLRA. *E.g.,* . . . *Teamsters* v. *Oliver,* 358 U.S. 283 (1959)."

2. The evidence of the alleged abuses was at best strained and minimal, especially in light of the fact that Equity has 23,000 members and nevertheless could not demonstrate any "abuses" beyond those few instances cited in footnote 5a. The quality of this evidence is demonstrated by the alleged "casting couch" practices which Equity contends have "not been eliminated". Equity cites only the testimony of one actress, Barbara Lea, to support this claim. While Equity refers to her testimony that a "notorious office chaser" actually chased her "around the office" (J.A. 163), Equity fails to note her testimony that this purported episode occurred in the mid-sixties, the "chaser" was unnamed, and he was dead at the time of trial and therefore could not rebut this charge of ancient misconduct (R. 45 (p. 759)).

The unions are correct in asserting that there are abuses and exploitation in actor-agent relationships. However, the unions fail to point out that most of the abuses are by actors who use their union's monopoly power and their own power to hire, fire, and exploit agents. Thus, as previously noted (Pet. Br. 6-7, 9), agents get no commissions for obtaining scale jobs for union members (which can pay in excess of $600 per week). Actors are paid directly by producers, and agents are forced to hope that the actors will then pay the agents the commissions they have earned.

Illustrative of overreaching by performers' unions and their members is the very recent decision of the Supreme court of California in *Graham* v. *Scissor-Tail, Inc.*, No. L.A. 31261 (Cal. Sup. Ct., filed Feb. 5, 1981), which held that the standard American Federation of Musicians Form B Contract imposed upon promoters is a contract of adhesion. In reaching this conclusion the court noted:

> "We believe that the contract here in question, in light of all of the circumstances presented, may be

fairly described as adhesive. Although defendant and its supporting amicus curiae are strenuous in their insistence that Graham's prominence and success in the promotion of popular music concerts afforded him considerable bargaining strength in the subject negotiations, the record before us fairly establishes that he, for all his asserted stature in the industry, was here reduced to the humble role of 'adherent.' It appears that all concert artists and groups of any significance or prominence are members of the A.F. of M.; that pursuant to express provision of the A.F. of M.'s constitution and bylaws members are not permitted to sign any form of contract other than that issued by the union. . . ." Slip op. at 14.

POINT I

The Business of Providing Agency Services to Actors Is Commerce Under the Sherman Act.

Petitioners are in the business of rendering agency services to actors.[4] That the Sherman Act was aimed at restraints on competition in the marketing of services as well as goods has long been acknowledged by the Supreme Court. *Apex Hosiery Co.* v. *Leader,* 310 U.S. 469, 493 (1940).

The AFL-CIO argues that the business of theatrical agents is not commerce under the Sherman Act because of the first sentence of section 6 of the Clayton Act, 15 U.S.C. §17, which states: "The labor of a human being is not a commodity or article of commerce." (AFL-CIO Br.

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[4] In stating that "throughout their brief petitioners never stop to identify the product market which allegedly is being restrained" (AFL-CIO Br.6), the AFL-CIO overlooked, *inter alia*, the petitioners' description of the restrained market as "the business of rendering agency services to actors" (Pet. Br.11). The market was also clearly identified in paragraphs 23 and 29 of the complaint (J.A. 22, 27).

6-7). This purportedly "incontrovertible" argument, improperly raised now for the first time,[5] is predicated upon the contention that the Equity-imposed restraints of trade (*e.g.*, fixing of agents' commission rates, boycott of agents) impact the labor market of union-member actors rather than the product market of theatrical agency services. (See AFL-CIO Br. 8).

Initially, it should be stated that the quoted sentence of section 6 could reasonably be interpreted as a simple introductory statement of the special dignity of human labor and the individual worker's right to use or withhold it as he sees fit. Certainly, in itself, that sentence does not exclude from coverage by the antitrust laws the business of non-labor parties who obtain employment for others.

In support of its strained interpretation, AFL-CIO relies primarily on a statement in *Apex, supra,* 310 U.S. at 503, that since the enactment of section 6 of the Clayton Act, "restraints on the sale of the employee's services to the employer . . . are not in themselves combinations or conspiracies in restraint of trade or commerce under the Sherman Act." However, the Court in *Apex* did not analyze or rely on the first sentence of section 6, but simply quoted it without specific discussion, along with the portion of the second sentence which was relevant to that case. Since it was a striking labor union which was there alleged to have violated the Sherman Act, the Court's statement cannot fairly support the implication that "the sale of the employee's services to the employer" was intended to include

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[5] *Ramsey* v. *United Mine Workers,* 401 U.S. 302, 312 (1971); *Neely* v. *Martin K. Eby Construction Co.,* 386 U.S. 317, 330 (1967). The AFL-CIO concedes as much. It suggests that this Court in *Radovich* v. *National Football League,* 352 U.S. 445 (1957), failed to consider the same issue as that raised here because it was "neither raised in the Court of Appeals below or in opposition to the petitioner's writ for certiorari," and therefore "not properly before the Court" when first raised in the respondents' brief (AFL-CIO Br. 10).

the activities of non-union independent contractors whose services are utilized by union employees.

If anything is incontrovertible here, it is the fact that the challenged franchise regulations impact the business market of theatrical agency services, and that market is subject to coverage under the Sherman Act. Any possible doubts of petitioners' foregoing contentions are dispelled by Equity's admissions in:

A. instituting a separate action charging that the Agents "have unreasonably restrained trade *in the interstate commerce of the rendering of services by theatrical agents to actors,* in violation of Section 1 of the Sherman Act" by agreeing to regulate the commissions charged to Equity members;[6]

B. alleging as an affirmative defense in the amended answer in this action:

> "Plaintiffs themselves have combined and conspired to fix the commissions which they charge to Equity members, in violation of Section 1 of the Sherman Act" (J.A. 45);

and by the admission of the AFL-CIO that "The primary import of the agent regulation . . . is their impact on the commissions of agents" (AFL-CIO Br. 15 n. 11).

So far as petitioners have been able to determine, no court has ever held that restrictions on employment-related practices of non-labor parties were immunized from antitrust laws because parties which "deal in the labor of human beings" are outside of "commerce". It is particularly significant that *American Federation of Musicians* v. *Carroll,* 391 U.S. 99 (1968), did not so hold.

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[6] *Actors' Equity Association* v. *Bret Adams, Ltd., et al.,* No. 78 Civ. 4506 (CBM) (S.D.N.Y.), complaint para.21 (emphasis supplied).

POINT II

There Is No Labor Dispute Between Equity and the Agents Unless the Agents Are Part of Equity's Labor Group.

For the first time in this action, respondents (Resp. Br. 33 n. 32) and their *amici curiae* (Joint Br. 8) have put forth the proposition that this case involves a "labor dispute" under the Norris-LaGuardia Act, 29 U.S.C. §§101-115, even if petitioners are not held to be part of Equity's labor group. Thus, they argue that Norris-LaGuardia precludes injunctive relief and requires dismissal of this action—presumably, even if an antitrust violation would otherwise be found. This argument is both untimely[7] and devoid of merit.

The question of whether this case involves a "labor dispute" coincides precisely with the question of whether petitioners are part of the "labor group". Although the courts have often failed to articulate the connection between these issues, no case can be found in which a union combined with a nonlabor group to restrain commerce, and yet the court refused an injunction because the case involved a labor dispute.

The district court decision in *Carroll* v. *American Federation of Musicians*, 241 F.Supp. 865, 887 (S.D.N.Y. 1965), makes the connection between these issues clear in passages which were quoted with approval by this Court:

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[7] Equity's claim that "the courts below did not reach" this issue (Resp. Br.33 n.32) is misleading in view of the fact that this issue was never raised below—not in the amended answer; not in any of the memoranda presented to the district court; not in any of the separate briefs of respondents, AFTRA, or SAG in the Court of Appeals below; and, most extraordinarily, *not in opposition to the Agents' motion for a preliminary injunction*. Under these circumstances this issue is clearly not properly before this Court. *Ramsey* v. *United Mine Workers* and *Neely* v. *Martin K. Eby Construction Co., supra* note 5.

> "The criterion applied by the District Court in determining that the orchestra leaders were a 'labor' group and parties to a 'labor dispute' was the presence of a job or wage competition or some other economic interrelationship affecting legitimate union interests between the union members and the independent contractors. If such a relationship existed the independent contractors were a 'labor group' and party to a labor dispute under the Norris-LaGuardia Act." 391 U.S. at 105-06.

This Court described the issue in *Carroll* as follows:

> "The question is whether union practices of the petitioners affecting orchestra leaders violate the Sherman Act as activities in combination with a non-labor group, or *are exempted by the Norris-LaGuardia Act as activities affecting a 'labor group' which is a party to a 'labor dispute'.*" *Id.* at 101 (emphasis supplied).

See also *United States* v. *Fish Smokers Trade Council*, 183 F.Supp. 227, 229 (S.D.N.Y. 1960). The holding in *Milk Wagon Drivers' Local 753* v. *Lake Valley Farm Products, Inc.*, 311 U.S. 91 (1940), cited by the unions, was characterized as follows by the *Carroll* district court: "Picketing was upheld as a means of inducing independent contractors comprising a *labor group* to join a union". 241 F.Supp. at 889 (emphasis supplied). In the *Milk Wagon* case, the members of the labor group performed the same functions as the members of the union and competed with them for jobs. The unions' reliance on *New Negro Alliance* v. *Sanitary Grocery Co.*, 303 U.S. 552 (1938) is similarly misplaced. That case stands only for the proposition that labor disputes protected by the Norris-LaGuardia Act are not limited to disputes between present employees and employers. They also include disputes "between persons seeking employment and employers." 303 U.S. at 561.

Thus, if this Court should agree with petitioners' basic position that they are independent businesses outside of

Equity's labor group, then the possibility that the case nevertheless arises out of a "labor dispute" is foreclosed.

POINT III

Equity's Franchising System Is Not Protected by the Nonstatutory Exemption.

The unions contend that if agents are not part of the labor group and the statutory exemption therefore does not apply, the franchising agreements between Equity and TARA[8] are immunized from the antitrust laws by the nonstatutory exemption. (AFL-CIO Br. 11-19, Resp. Br. 24-27). While petitioners agree with certain legal principles cited by the unions, such as that union restraints permissible under the nonstatutory exemption must be "no greater than necessary to eliminate wage competition among actors"[9] (AFL-CIO Br. 16), petitioners do not agree with the unions' conclusions "that the agreements between Actors' Equity and theatrical agents further 'a subject of immediate and legitimate concern to union mem-

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[8] TARA is a trade association of agents who compete with petitioners. See Pet. Br. 3 n.2.

[9] In this regard see *Connell, supra* note 3, 421 U.S. at 625 (holding that the union's organizing goals were a legitimate labor objective "but the methods the union chose are not immune from antitrust sanctions simply because the goal is legal"); *Adams, Ray & Rosenberg* v. *William Morris Agency,* 411 F.Supp. 403, 411 (C.D. Cal. 1976) (holding that William Morris had failed to demonstrate a likelihood of proving that the challenged union regulation of agents "gives the Guild [union] market control beyond that needed to further its legitimate interest in maintaining the wages of its members"); *Consolidated Express, Inc.* v. *New York Shipping Association,* 602 F.2d 494, 517-518 (3d Cir. 1979), *vacated on other grounds,* 100 S.Ct. 3040 (1980):

> "The requirements for antitrust exemption are, first, that the market restraint advance a legitimate labor goal, and, second, that the agreement restrain trade no more than is necessary to achieve that goal."

bers' and do no more than restrain wage competition" [10] (AFL-CIO Br. 15). While petitioners agree that the antitrust laws apply to "restraints on competition in the product market," those restraints are not limited to "the sort that businessmen in the market might undertake on their own." [11] (Resp. Br. 25).

The challenged conduct of Equity (group boycott, price fixing, agreement not to compete, monopolization, restraints upon a business market) is not protected by the nonstatutory exemption. *Connell Construction Co.* v. *Plumbers & Steamfitters Local 100,* 421 U.S. 616 (1975) (*"Connell"*); *United Mine Workers* v. *Pennington,* 381 U.S. 657 (1965) (*"Pennington"*); *Allen Bradley Co.* v. *Local 3, IBEW,* 325 U.S. 797 (1945) (*"Allen Bradley"*); *Consolidated Express, Inc.* v. *New York Shipping Association, supra.* This is best demonstrated by *Connell,* where this Court noted that a very limited amount of joint union-nonlabor-group conduct was permitted by the nonstatutory exemption:

> "The Court has recognized, however, that a proper accommodation between the congressional policy favoring collective bargaining under the NLRA and the congressional policy favoring free competition in business markets requires that some union-employer agree-

[10] The AFL-CIO contradicts this statement when it admits that "the primary import" of the franchising regulations "is their impact on the commissions of agents." AFL-CIO Br. 15 n.11. This admission is consistent with the admission that "the agreements here do not foreclose competition in any respect *other than to place a cap on the commissions agents may charge.*" AFL-CIO Br. 17 (emphasis supplied). Such a "cap," or fixing of the maximum price agents may charge, is illegal *per se. Albrecht* v. *Herald Co.,* 390 U.S. 145 (1968).

[11] Even if this were a correct statement of the law, it nevertheless is beyond dispute that the agents (who are independent "businessmen") "might undertake" to fix prices (i.e., commission rates) "on their own" without union assistance. See, *e.g., United States* v. *National Association of Real Estate Boards,* 339 U.S. 845 (1950) (involving a conspiracy by real estate brokers to fix commission rates for their services).

> ments be accorded a limited nonstatutory exemption from antitrust sanctions. *Meat Cutters* v. *Jewel Tea Co.*, 381 U.S. 676 (1965)." 421 U.S. at 622.

Accordingly, it is submitted that the nonstatutory exemption which rests upon the "congressional policy favoring collective bargaining" has no applicability here because Equity's collective bargaining with the producers, the employers of its members, remains unaffected by Equity's ability to franchise agents.[12]

The Court in *Connell* went on to point out that "the nonstatutory exemption offers no similar protection where a union and a nonlabor party agree to restrain competition in a business market." 421 U.S. at 622-23. The Court held that the nonstatutory exemption does not apply to those situations where unions impose a:

> "direct restraint on the business market [which] has substantial anticompetitive effects, both actual and potential, that would not follow naturally from the elimination of competition over wages and working conditions." *Id.* at 625.

Here the franchising agreement between Equity and TARA, imposes direct restraints on the business market of procuring employment for actors in the legitimate theatre industry and the rendering of related services. These restraints have the actual and substantial anticompetitive effect of eliminating the Agents as competitors in the agency industry. Such restraints (*e.g.*, price fixing by agents) do not follow naturally from the elimination of competition between actors over wages and working con-

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[12] While the unions contend that the nonstatutory exemption is not limited to collective bargaining situations (AFL-CIO Br. 19 n. 14, Resp. Br. 34 n. 32), they do not cite any authorities which support their contention. In this regard see *Philadelphia World Hockey Club, Inc.* v. *Philadelphia Hockey Club, Inc.*, 351 F.Supp. 462, 499-500 (E.D. Pa. 1972).

ditions, but instead are artificial restraints imposed by Equity upon an independent group of businessmen, the Agents.

It is clear from the facts of the *Connell* case itself, and such cases as *Allen Bradley* and *Pennington,* that the elimination of the Agents as theatrical agents, does not follow naturally from the elimination of competition over wages and working conditions. In *Pennington,* the defendant union entered into an agreement with large mining companies whereby the union would seek "to impose the agreed-upon wage and royalty scales" of the collective bargaining agreement upon smaller mining companies, regardless of their ability to pay, the effect of which would be to eliminate the smaller companies from the industry. There, as here, the defendant union took the position "that since such an agreement concerned wage standards, it is exempt from the antitrust laws." 381 U.S. at 664. In rejecting this contention and holding that the union's conduct was subject to the Sherman Act, the Supreme Court stated that "there are limits to what a union or an employer may offer or extract in the name of wages, and because they must bargain does not mean that the agreement reached may disregard other laws." *Id.* at 665. The Supreme Court's reference in *Connell* to the kind of restraint on competition which arises naturally from the elimination of competition over wages and working conditions, refers to conduct such as union members agreeing among themselves to fix the price of the services which they will charge employers, so that employers may be legally forced to pay all union members identical prices for their services, thereby losing their ability to negotiate with the union or its members in competition with each other. This is established by the following language from *Pennington*:

> "The union benefit from the wage scale agreed upon is direct and concrete and the effect on the product market, though clearly present, results from the elimination of competition based on wages among the em-

> ployers in the bargaining unit, which is not the kind of restraint Congress intended the Sherman Act to proscribe" (381 U.S. at 664);

and from *Connell*:

> "The Court therefore has acknowledged that labor policy requires tolerance for the lessening of business competition based on differences in wages and working conditions. See *Mine Workers* v. *Pennington, supra,* at 666; *Jewel Tea, supra,* at 692-93 (opinion of WHITE, J.). Labor policy clearly does not require, however, that a union have freedom to impose direct restraints on competition among those who employ its members." 421 U.S. at 622.

It is clear from the foregoing that Equity's conduct in seeking to eliminate and destroy the business of theatrical agents who will not accept Equity franchises is not the kind of restraint on competition which arises naturally from the elimination of competition between union members for wages or the elimination of competition between employers in negotiating with a union with respect to wages and working conditions.

POINT IV

The Unions' Rationales for the Regulation of Agents Do Not Justify the Severe Restrictions Placed Upon Agents.

The unions offer three basic rationales to justify their pervasive regulation of agents:[13] (A) agents control ac-

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[13] The detailed rules and regulations of Equity's present pervasive and comprehensive franchising system for agents include the following provisions, *inter alia*:

a. only agents who are franchised by Equity may represent Equity members;

b. Equity may refuse to grant a franchise to an agent if in Equity's "opinion" the agent is "not qualified";

cess to employment; (B) the prohibition of commission on scale jobs is necessary to prevent invasion of union negotiated minimum wage scales; (C) regulation of the commissions agents may charge is necessary to prevent wage competition among union members. As previously noted, union restraints on non-union members are not immunized by the labor exemption unless it is shown that each restraint: (1) furthers a legitimate labor objective; and (2) restrains trade no more than necessary to achieve the desired objective. Moreover, the union has the burden of establishing the foregoing.[14] As will be demonstrated below, the union rationales do not permit Equity to satisfy the above burden and do not justify Equity's pervasive regulation of agents. Moreover, Equity has not even attempted to justify its extraction of franchise fees from agents.

A. *Agents' Control of Access to Employment.*

Admittedly, agents have greater access to producers and casting directors than most actors. Nevertheless, that cir-

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c. the limited terms and conditions under which agents may charge commissions (including the maximum commissions agents may charge);

d. the numerous duties and responsibilities of agents to Equity members;

e. the terms and conditions of contracts between agents and Equity members (including the duration of those contracts);

f. all disputes between an actor and an agent must be submitted to arbitration;

g. Equity may discipline agents, which discipline may include fines not to exceed $5,000, forfeiture of commissions, and franchise revocation;

h. agents must pay initial and annual franchise fees to the Union;

i. agents may not deal with producers who are on Equity's black list of producers;

j. Equity may waive compliance with the franchising requirements for agents it chooses to favor. (Pl. Ex. 71, R. 44 (p. 380), J.A. 209; Pl. Ex. 72, J.A. 245).

[14] *Consolidated, supra* note 9, 602 F.2d at 517.

cumstance does not justify the existence of Equity's franchising system since it is not "intimately related to wages, hours and working conditions" of union members (*Local 189, Amalgamated Meat Cutters* v. *Jewel Tea Co.*, 381 U.S. 676, 689 (1965)) which are determined by collective bargaining agreements negotiated without the participation of agents.

The unions have not cited any case nor have petitioners found any case which held that a union was justified in imposing restraints of trade upon independent business persons (who did not compete with union members)—simply because those independent persons had greater access to potential employers than union members.

Equity has not even attempted to show that the imposition of the following restraints of trade, *inter alia*, upon agents is justified merely because of the agents' greater access to employment opportunities than actors:

A. agents must pay franchise fees to the union;

B. agents cannot deal with producers who are on Equity's blacklist;

C. agents cannot collect commissions on scale or minimum wage jobs;

D. agents must submit disputes with Equity members to arbitration;

E. agents cannot collect commissions in accordance with governing state law.

B. *Regulation of the Commissions Agents May Charge Is Not Necessary to Prevent Wage Competition Among Union Members.*

The unions do not dispute the Agents' contention that, "There is no evidence that absent its franchising system Equity would be unable to 'eliminate wage competition among its members'." (Pet. Br. 23). Instead, the unions

now argue that regulation of agents' commissions is necessary because otherwise "actors could compete with respect to the percentage of their wages they were willing to cede to an agent in order to be accepted by the agent as a client." (AFL-CIO Br. 16). This argument has several flaws: (1) there is no evidence that actors compete with each other for the services of agents; (2) the money paid to agents is from an actor's disposable income not his wages, even though the amount of disposable income is measured by a percentage of the wages the agent obtained for the actor—thus there can be no "wage competition" in this respect; (3) absent the franchising system actors would continue to pay the customary 10% commissions to agents who obtained jobs for them. In order for actors to then engage in a "wage competition" for agents' services, they would have to offer agents a commission in excess of 10%, which would be violative of Article 11 of the General Business Law of the State of New York. Thus, there is no reasonable basis to project a "wage competition" among union members in the absence of union regulation of agents.

The unions also argue that regulation of commissions is necessary to prevent excessive commissions. This argument ignores the fact of state regulation of agents' maximum commissions and the Agents' undisputed contention that there is no evidence that any agent charged any actor an exorbitant commission or "a commission in excess of the 10% commission permitted" by state law.[15] (Pet. Br. 22).

Finally, it should be noted that despite the existence of similar "wage competition" in *Carroll*, the Supreme Court did not use this issue as a basis for its decision.

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[15] Equity's claim (Resp. Br. 6 n. 5a), that there is continuing "agent pressure for commissions exceeding ten percent of wages" is "supported" only by the testimony of one of its 23,000 members (Barbara Lea) that "in the mid-60's" an agent pressured her into paying more than 10 percent. The member, of course, did not complain to Equity (J.A. 161-162), did not identify the agent and did not know if the agent was licensed by the State of New York (R. 45 (p. 760)).

C. *The Prohibition of Commissions on Scale Jobs Is Not Necessary to Prevent Invasion of Union Negotiated Minimum Wage Scales.*

While the unions do not dispute the Agents' contentions: (1) that there is no evidence that a prohibition of commissions on scale jobs[16] helps Equity eliminate wage competition among members (Pet. Br. 31); and (2) that commissions are paid out of an actor's disposable income (Pet. Br. 24-25); they continue to insist that commissions nevertheless "directly and inevitably reduce the wages" of actors. (Resp. Br. 11-12). Apparently, aware of the weakness of this argument, the unions now also claim (without resort to any logical rationale or evidence in the record) that it is the agents' access to employment which justifies Equity's prohibition of commission on scale jobs. (See AFL-CIO Br. 18, n.13, Joint Br. 19-20, Resp. Br. 7, 31). However, as previously demonstrated, the agents' access to employment is not related to and does not affect minimum wages negotiated for union members by Equity and the various producers.

In *Carroll* the Supreme Court did *not* hold that the impact of agents' commissions upon the AFM's minimum wage structure justified union regulation of agents. Instead, it held that such regulation was justified by the agents booking "engagements for musicians at wages which were below union scale." 391 U.S. at 113. Such a finding is not possible here. (Pet. Br. 20-21).

D. *The Imposition of Franchise Fees Remains Unjustified.*

The unions make no effort to justify the imposition of franchise fees upon agents other than to incorrectly assert that the courts below made a "factual finding" that Equity's franchise fees were cost justified (Resp. Br. 32, n.30). In fact, the Court of Appeals held:

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[16] Union scale or minimum wage jobs should not be confused with the federally mandated minimum hourly wage, which was raised to $3.35 per hour for 1981. 29 U.S.C. §206(a)(1).

> "While the union argues that they [franchise fees] are necessary to pay the union's expenses in administering the franchise system, no evidence was presented at trial to show that the union's costs justified the franchise fees." 622 F.2d at 651 (J.A. 349-50).

In any event, the issue raised on this appeal is not whether the union's franchise fees are cost justified; rather, the issue as stated in the Petition for a Writ of Certiorari is:

> "4. Should the holding in *Carroll* be extended to permit the Union . . . to extract franchise fees [regardless of amount] from theatrical agents as payment for the right to be regulated and dominated by the Union?"

The unions do not address this issue.[17] While the unions' briefs attempt to justify the need of performers' unions to regulate agents by contending that such regulation is for "the purpose of promoting fair access to jobs and upholding union wage scales" and to eliminate "wage and job competition" between union members (Resp. Br. 6, 7), the unions do not contest the Agents' claim that a total absence of franchise fees would not affect an actor's access to jobs through an agent, interfere with union wage scales, or interfere with the union goal of eliminating wage and job competition. (Pet. Br. 32-33). Nor do the unions dispute the Agents' contention that *Carroll* did not sanction union extraction of franchise fees from agents (Pet. Br. 32).

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[17] Respondents' claim (Resp. Br. 32 n. 30) that part of the franchise fees are used to render services to agents, including arbitrations (which are forced upon agents under the franchising rules), has no support in the record and contradicts Equity's claim that its franchising "requirements benefit only union members" (Resp. Br. 7).

CONCLUSION

Petitioners request that the decisions of the Courts below be reversed and that this Court remand this case to the District Court for the issuance of appropriate injunctive relief.

Dated: New York, New York
March 13, 1981

Respectfully submitted,

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